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IN THE

Supreme Court of the United States

No. 70-96

PHILIP J. PICARD,

Petitioner,

v.

JAMES J. CONNOR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIRST CIRCUIT

BRIEF FOR THE RESPONDENT, JAMES J. CONNOR

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TABLE OF ABBREVIATIONS AND TERMS

Tr.	Transcript of the Trial by Jury
R.	Summary of Record Prepared by the Trial Court and Used on Appeal in the Supreme Judicial Court
S.J.C.	Supreme Judicial Court
P. and p.	Page
Pp. and pp.	Pages
Mem.	Connor's Memorandum of Law and Fact in U.S. District Court, Connor v. Picard, 308 F. Supp. 843 (1970)
M.G.L. and G.L.	Massachusetts General Laws
Assignment of Errors	List of Complaints and Exceptions Relied on by Connor on Appeal to the Supreme Judicial Court Contained in the Summary of Record
Connor's Brief	The Brief presented by Connor in the Supreme Judicial Court
Picard Brief	The Brief of the Petitioner Picard in the instant case, No. 70-96

NOTE: In the many hearings held in the months prior to the trial and after Connor's arrest (August 6th, 1965 to March 14, 1966), there is no consecutive numbering of the pages or identification of the separate records of each hearing other than by date. In the brief, therefore, the date of the hearing under discussion is first mentioned and there is then a reference by page.

PRIOR PROCEEDINGS

A. 112 - Commonwealth v. Doherty, et al., 353 Mass. 197 Opinion, Supreme Judicial Court of Massachusetts.

A. 50 Connor v. Picard, 308 F.Supp. 843 Opinion, United States District Court.

A. 4 - Connor v. Picard, 434 F.2d 673 Opinion, Court of Appeals, First Circuit.

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STATEMENT OF THE ISSUES

The foremost issues in this case are as follows:

I. Whether the Respondent was required to be indicted under the Constitution and Laws of the Commonwealth of Massachusetts and of the United States.

II. Whether the amending procedure, even if sanctioned by the Fictitious Name Statute, violated the Respondent's Federal Constitutional Rights.

III. Whether the Respondent has exhausted his state court remedies.

IV. Whether the Massachusetts amending procedure served a valid state purpose.

V. Whether, if said purpose was valid, the Federal Courts were thereby deprived of jurisdiction in habeas.

VI. Whether the Respondent, James J. Connor, was provided with a Full and Fair Trial according to Due Process, the Law of the Land.

STATEMENT OF THE CASE

The respondent, James J. Connor, was convicted of murder in the first degree on March 26th, 1966, in the Superior Court of Suffolk County in Massachusetts.

On August 4th, 1965, the indictment on which Connor was tried and convicted had been returned charging "John Doe, the true name and a more particular description of the said John Doe being to the said jurors unknown," with the murder of Robert W. Davis on May 1, 1965 (R. 41). This indictment also charged a "Donald E. Landry, otherwise known as Emo Landry," with the same crime (R. 41). Both Ronald Hayes and Betty Moore testified before this Grand Jury in the summer of 1965, between June and August, prior to the indictment. Hayes testified in August, prior to the 4th, and Betty Moore testified in August, prior to the 4th, and sometime early in the summer of June (Tr. 1200, 1217, 1218, 1219, 1220, 1221) (Tr. 905, 906, 907, 915, 916, 1029, 1030). Miss Moore admitted telling different stories to the Grand Juries on both occasions on which she appeared before them. The failure of the Grand Jury to name Connor, your respondent, as a defendant in the indictment, either by name or by description, is sufficient

evidence of the nature of Hayes' testimony before it as to whether or not Connor was connected with the murder. On an occasion subsequent to the date of the testimony he had given before the Grand Jury, Hayes was taken to Police Headquarters and asked to identify Connor (Tr. 1218, 1219). Hayes further testified that the first time he saw Connor after the date of the alleged crime was when he was brought to Headquarters after his testimony to the Grand Jury in August of 1965 (Tr. 1212). When questioned as to where he had identified Connor, he said, "Headquarters." He did not testify at any time that he had identified Connor on his previous visit to the Grand Jury. The only date Connor was at Headquarters was August 6, 1965 (A. 76). On that date, two police officers had gone to the apartment of Donald E. Landry and were permitted to enter. A group of people, including two men, the defendant Connor and another man of the same size and stature as Connor, were present. After considerable conversation, both men were taken to police headquarters, where they were held for six or seven hours, without charge. The other man, who had been confined in a penal institution on and after May 1, 1965, was then released, and Connor was taken to Division 11 of the Boston Police Department, in Dorchester, and booked for the murder of Davis (R. 63, 64, 65, 91, 92, August 24, 1965, pp. 1 to 7; A. 81, 82; A. 87, 88; A. 108).

Hayes and Moore were the only witnesses at the trial by jury thereafter who placed Connor at the scene of the crime.

On August 9, 1965, the Assistant District Attorney presented a motion to amend the indictment by striking the name, "John Doe," and substituting the name, "James J. Connor" (R. 57). The only reason advanced in support of this motion was the statement of the prosecutor that, "At the time the indictment was returned, the District Attorney and the Grand Jury did not know the name of the defendant. Since the indictment has been returned, we have

ascertained the name of the defendant" (August 9, 1965, p. 1). This amendment was allowed over the objection of Connor's counsel.

After his conviction, Connor appealed to the Supreme Judicial Court of Massachusetts. In this appeal the issues were raised, (a) that the indictment was a nullity (Connor's Brief, S.J.C., pp. 11 to 14, inclusive; Assignment of Errors, 1, 3, and 4, R. 99); (b) that the indictment, being for a capital offense, could not be amended, even with the defendant's consent, had it been given (Connor's Brief, S.J.C., p. 11, par. 4); (c) that the indictment was unconstitutional under the Constitutions of the United States and of Massachusetts since no probable cause had been shown any one prior to Connor's trial (Connor's Brief, S.J.C. pp. 11, 12); (d) that the indictment was unconstitutional under the Constitution of the United States by virtue of the application under the Fourteenth Amendment of the provisions of the guarantees of the Bill of Rights where fundamental rights are involved (Connor's Brief, p. 13); (e) that Connor was unlawfully arrested on the night of August 6th on the "John Doe" warrant which issued on the void indictment and was arrested without probable cause in violation of the Constitutions of the United States and of Massachusetts (Connor's Brief, pp. 11, 14 and 15; Assignment of Errors 3, 4, and 5, R. 99); (f) that Connor was unconstitutionally denied any access to the minutes of the Grand Jury (Connor's Brief, pp. 15, 16, 17); (g) that Connor was denied due process in numerous other matters, including certain evidence which was declared "admissible" by the Supreme Judicial Court although its exclusion was not "reversible error," even though it was vital on the matters of credibility and motive.

The judgment of the jury court was affirmed by the Supreme Judicial Court on August 22nd, 1967 (229 N.E.2d 267).

Thereafter a Petition for Certiorari was filed in the Supreme Court of the United States (Misc. 942) and denied

on March 11, 1968. In this petition the questions relating to the indictment and Grand Jury minutes were relied upon (390 U.S. 982).

In December, 1968, the respondent, Connor, filed a Petition for a Writ of Habeas Corpus in the United States District Court at Boston. The petition, after hearings, was dismissed on January 16, 1970, and an appeal was filed in the United States Court of Appeals for the First Circuit.

In the petition and the hearings thereon, the issues of unconstitutionality and illegality of the indictment and subsequent arrest under federal and state law were again raised (Petition, Argument Par. 1 and 2, p. 6 and 7), as was the issue of the denial of his fundamental rights according to the law of the land (Petition, Argument Par. 3, 4, 6, 7) described at one point in Connor's "Memorandum of Law and Fact" as including the basic principles incorporated in the due process, privileges and immunities, and equal protection clauses of the Fourteenth Amendment (Mem. p. 14).

The issues raised in the Court of Appeals by Connor were substantially the same as to the indictment and the denial of a full and fair trial by reason of the violation of his fundamental rights.

On December 10th, 1970 the Circuit Court of Appeals vacated the order of the District Court and ordered the case remanded, the writ to be granted by the District Court. should Connor not be again indicted within a reasonable time in Suffolk County. A mandate issued on December 31st. This Petition for Certiorari on behalf of the Commonwealth seeks to prevent the granting of Habeas Corpus.

STATEMENT OF FACTS RELATING TO THE HOMICIDE

PART I

There was evidence that, on May 1, 1965, in the early hours of the morning, Robert W. Davis was shot in the chest with a 12-gauge shotgun in the apartment on the third floor of the premises at 116 Dakota Street, Dorchester (Tr. 808, 862, 1106, 1380). The body of Davis was found by the police on the porch at 116 Dakota Street at about 3:02 A.M. on that date (Tr. 158, 297). An examination of the body disclosed that a shot had pierced the aorta, resulting in massive hemorrhage, which produced death (Tr. 1385, 1388).

The defendants, William and Janice Doherty, husband and wife, lived in the said apartment with their 4½-year-old son (Tr. 1441-1442). Betty Moore, a witness, had also been living there for a year or two (Tr. 1443-1444).

In the early morning of May 1, 1965, there was a gathering in the kitchen of the said apartment, comprising Ronald Hayes and Betty Moore, who arrived first, and William Doherty, Janice Doherty, Robert Davis and Ronnie Edwards (Tr. 830-831). Previously, all the members of the party had been at the Sportsman's Bar in Dorchester, where Janice Doherty was introduced to Robert Davis for the first time by her husband (Tr. 1452). Various members of the party were eating and drinking beer, and Janice began to cook (Tr. 1457). William Doherty and Robert Davis left the kitchen and went into another room (Tr. 1457). While they were gone, Ronnie Edwards said his friend, Robert Davis, "might be little but he's touch" (Tr. 1458). Janice called her husband and Davis back after a while to eat (Tr. 1459). While the entire group was then gathered in the kitchen, Davis ordered Edwards to "go and get the queen; go and get the payload" (Tr. 1087, 1089, 1136, 1137). Then Davis and William Doherty went out of the kitchen again and, after a while, Davis came back again and said, "I told you, you better get going. Pick up the payload"

(Tr. 1462). He was very mad, and he had a gun in his hand Tr. 1462, 1463). He then went back into another room with William Doherty, whereupon Edwards said that when his friend got mad, he was very dangerous (Tr. 1463). Edwards then left the apartment through the front door, and Betty Moore invited Ronald Hayes into her bedroom (Tr. 834, 1464). Janice Doherty remained in the kitchen (Tr. 1465).

Janice Doherty testified that, shortly afterward, she heard some noise and went into the baby's bedroom (Tr. 1465). The baby was in bed, and Robert Davis was holding two guns, one pointed at William Doherty and one at the baby (Tr. 1466). Davis threatened William Doherty, and the baby awoke and began to cry (Tr. 1467). Janice picked up the baby (Tr. 1468). The two men then left the baby's bedroom (Tr. 1468). Janice went back into the kitchen (Tr. 1470). While she was cleaning, Betty came out of her bedroom, got two bottles of beer from the refrigerator, and went back into her bedroom, without comment (Tr. 1470). Right after that, a man called Paul Sims, a friend of Betty and Ronald, knocked at the front door (Tr. 1471, 1472). He inquired for Betty and was told by Janice that Betty was with Ronald Hayes (Tr. 1472). He said, "All right," and left (Tr. 1472-1473). At this moment, a commotion started in the living room (Tr. 1473). Janice closed the front door, and Betty, who had opened her bedroom door, asked what the confusion was (Tr. 1474). Janice went into the living room and found her husband on the floor (Tr. 1475). Davis had a gun to his head (Tr. 1475). The coffee table was upset, with a leg broken off (Tr. 1475). Janice ordered him out and threatened to call the police (Tr. 1476). Davis pointed the gun at her and said he would blow everybody's head off (Tr. 1476). Janice then went into the baby's bedroom, saw that he was sleeping, and then went to the hall and began to dial the police (Tr. 1477). Davis came into the hall carrying two guns and threatened to blow her head off (Tr. 1478). His face was contorted (Tr. 1478). She went back to the baby's room

(Tr. 1479). Some time later, she made a phone call from Betty's room (Tr. 1498). She took the phone from the hall through the door and told Betty and Ronald Hayes that, "There was a crazy man out there with two guns at my husband's head" (Tr. 1499). Then she dialed Emo on the phone (Tr. 1499). Emo was a friend of her husband and herself (Tr. 1499-1500). She said, "Emo, Emo, this is Janice. Would you please come to my house and help me get this man out of my house? He is crazy" (Tr. 1500). A strange voice responded and told her Emo was not there (Tr. 1501). She hung up and left the room (Tr. 1501). A short time later, Janice went back to Betty's room with the phone and dialed the same number (Tr. 1503). She told the person who answered that Davis still had a gun at her husband's head (Tr. 1504). She said, in the presence of Betty and Ronald Hayes, that she lived at 116 Dakota Street on the third floor (Tr. 1503-1504). The telephone number for Emo was written on a card hung on the wall by the telephone in the hall (Tr. 1529).

Betty Moore testified that on Janice's last call, Janice gave the address of the house, 116 Dakota Street, to the person on the other end of the line (Tr. 845). Some time after the last call, Betty left the apartment and ran down to the front porch as Ronnie Edwards returned in his automobile with another fellow (Tr. 848). Ronald Hayes was still in her bedroom when she left (Tr. 968). Betty testified that he, Ronald Hayes, did not have a gun at that time (Tr. 969). All the other doors on the hall were closed (Tr. 969). Betty was barefooted at the time (Tr. 971). She spoke to Ronnie Edwards on the porch, and he left in his car (Tr. 848). The other man did not leave (Tr. 848). She learned afterward that his name was Delaney, alias Shepard (Tr. 998). Delaney held a gun to her head (Tr. 999). At this point, William Doherty came down the front stairs onto the porch (Tr. 849). Doherty started to fight with Shepard, alias Delaney, and told Betty Moore to get out of there (Tr. 850). She ran down the front stairs, along the side of the house, along Iowa Street to the garage where she stood

between a car and the garage door (Tr. 851). She heard a shot. Then she Delaney run past her along Iowa Street (Tr. 791, 850, 851). On May 15, she sent a letter to William Doherty at the Charles Street Jail (Tr. 993) in which she thanked him for risking his life for hers (Tr. 995).

On cross examination the witness admitted that she ran for her life from Delaney and injured her ankle in so doing (Tr. 997, 999). She and Delaney, the armed man who returned with Edwards (Tr. 848) after Edwards was sent by Davis to fetch the "queen" with the "payload" (Tr. 1087, 1089, 1136, 1137, 1462), did not know each other (Tr. 782, 998).

Some time after Delaney had run past Miss Moore down Iowa Street (Tr. 791) from the porch where he had first encountered her she heard a shot from upstairs (Tr. 851).

Janice Doherty testified that, after Betty left her room to go downstairs to the porch, Janice also left the room to go to the baby's room (Tr. 1486). Ronald Hayes was still in Betty's bedroom (Tr. 1486). While Janice was in the baby's room, she heard a shot downstairs (Tr. 1487). She heard the sound of footsteps from the front stairs (Tr. 1488). Janice went to the front hallway and was pushed aside by two men who went into one of the rooms off the hall, called the den, where Davis was sitting (Tr. 1489). She heard a shot (Tr. 1490). Janice did not recognize the two men (Tr. 1520). She had never seen them before (Tr. 1520). Neither of the men who came into her house at that time was Emo (Tr. 1521). When the men went into the room, Davis had a gun beside him on the couch (Tr. 1546). Janice had known James J. Connor, the respondent, for ten years (Tr. 1547, 1552). He had visited at her home three or four times within the preceding year (Tr. 1547). She did not see James Connor at her home at any time May 1, 1965 (Tr. 1552). He was not one of the two men who went into the room with Davis (Tr. 1552). If she had known the two men, she could have recognized them (Tr. 1553).

Exhibit 40, a picture of the back of the house at 116 Dakota Street, and the garage in the rear, shows a picket fence around the roof ot the garage within the projecting top of the garage. The automobile in the driveway is close to the door of the garage. There is a lintel over the door of the garage and the roof of the garage projects. This exhibit was admitted in evidence as a fair representation as of May 1, 1965, without objection (Tr. 1551).

The defense contended that it was a physical impossibility for anyone standing in the doorway of the garage to see anyone standing on the garage roof, by day or night.

The only witnesses placing James J. Connor at 116 Dakota Street on the night of the alleged murder were Betty Moore and Ronald Hayes.

STATEMENT OF FACTS RELATING TO THE TRIAL

PART II

On several occasions, the witness, Elizabeth Moore, testified that she had never met Robert W. Davis, the deceased, before the night of April 30 and May 1, 1965, the night of the alleged murder (Tr. 830, 831, 933, 937, 992). However, on cross-examination, she admitted that during a police investigation the name of Davis had been mentioned in connection with her own boss (Tr. 991, 992). These admissions were elicited only after considerable evasiveness by Miss Moore (Tr. 990). She had been employed by the University Hospital in the Accounts Receivable Department from February to June, 1965, and her supervisor was one Vincent Murdock, office manager (Tr. 1571-1572).

Murdock was called as a witness by the defense, and there was an offer of proof that he would testify that he had a connection with Miss Moore concerning a robbery (Tr. 1575). On a voir dire, Murdock testified that the holdup took place three days before the killing of May 1, 1965 (Tr. 1578); that Miss Moore was out to lunch at the

time of the holdup (Tr. 1581); that she expressed curiosity, and said she would like to go along to look at pictures at Division 4 to pick out the fellow who committed the holdup (Tr. 1580); that Murdock picked out a picture of Davis as looking like the individual who held him up (Tr. 1579); and that Murdock later discussed with Miss Moore the fact that Davis looked like the man who held him up (Tr. 1579). The Court refused to allow the presentation of this evidence before the jury (Tr. 1581), even though Miss Moore herself had previously admitted that her boss Murdock had connected her with Davis in the robbery (Tr. 991, 992).

Murdock should have been allowed to testify to this effect and further. It was evidence that the murder victim had in fact crossed the path of Miss Moore before the night of the alleged murder, and the interest shown by Miss Moore, who was not even in the office at the time of the holdup, in being with Murdock at the time he tried to pick out the picture of the robber for the police, raises a clear inference that there was some complicity between the alleged murder victim and this important Commonwealth witness. This evidence was excluded at the trial together with whatever light it might have played upon the motives and credibility of the material witnesses although afterwards it was declared to have been "admissible" by the Supreme Judicial Court.

ARGUMENT

I. THE TRIAL OF THE RESPONDENT, JAMES J. CONNOR, WITHOUT PREVIOUS INDICTMENT WAS IN VIOLATION OF THE FOURTEENTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF ARTICLE XII OF THE DECLARATION OF RIGHTS.

The Constitution of Massachusetts, Article XII, provides that indictment on a criminal charge must precede trial by jury and that the Grand Jury must have found probable cause. *Comm. v. Holley*, 3 Gray 458, 459.

"The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." *Jones v. Robbins*, 8 Gray 329, 344.

It has been the contention of the respondent Connor in this case that his case was never brought to the attention of the Grand Jury, that the matter of the probable cause of his guilt was never considered by them, and that he was never indicted. The indictment itself, presented under oath by the Grand Jurors, bears this out. In it the Jurors swear that the identity of the second man involved as a principal in the alleged murder of Robert W. Davis was unknown to them and that they had no description of him. By the use of the words "John Doe" they could only indicate that they had received information that a second man was involved. "John Doe" is not an alias nor a fictitious name in the sense that it was so used by any person. It is not an erroneous name, nor a nickname. It is a legal device for filling a blank, a device which is perhaps justified when accompanied by "any other practicable description," but

by itself it does nothing more than fill out the terms of a general or blank indictment or warrant, the type of document described by Chief Justice Bigelow in *Commonwealth v. Crotty*, "upon which any other individual might have been arrested, as being included in the description, as the defendant himself." 10 Allen 403, 404.

If the indictment in this case be held valid, then it is possible in the Commonwealth of Massachusetts, in defiance of the ancient common law right to be secure from unreasonable arrest or seizure and in defiance of the State law, G.L. 263 § 4, to procure a general indictment for any crime committed and, on unsupported suspicion, to bring any citizen to public trial, identifying him only as he is arraigned by action of the trial court. No probable cause need be shown anyone prior to the public accusation in the dock.

Conceding that there is no general due process right under federal law to require the states to precede trial with indictment, the right to have probable cause established nevertheless remains to be disposed of, and as Massachusetts law provides no alternative procedure in capital cases, indictment is required by the principle of due process as a matter of fundamental right.

The function of the Grand Jury at common law was the determination of probable cause. *Beavers v. Henkel*, 194 U.S. 73, 84. Probable cause or presentment is coupled with trial by jury as common law twin rights indispensable to the states in due process. *Duncan v. Louisiana*, 391 U.S. 145. In *Hurtado v. California*, 100 U.S. 516, indictment is regarded as dispensable in view of the substitution of a system of finding probable cause.

As to the procedure in this case after the presentment of the "John Doe" indictment, if there had been newly discovered evidence, the matter should have been returned to the Grand Jury. *Comm. v. Drew*, 3 Cushing 279; *Ex parte Bain*, 121 U.S. 1.

However, in our case the prosecutor was confronted with the fact that the August, 1965, Grand Jury had already

heard his only two identifying witnesses deny that they knew by name or could describe "John Doe" in any way; otherwise, the Grand Jury should certainly not on its oath declare it had no name or other practicable description. In this sense the process of amendment served well the "prosecutorial convenience" (Aldrich, Chief Judge, Judgment of December 10th, 1970, A. 10).

As to the interpretation of the statute (M.G.L. ch. 277, § 19), it is at least doubtful that it was intended to authorize the issuance of blank indictments and warrants (Dissenting Opinion, *Comm. v. Doherty*, 229 N.E.2d 267, 279, 280).

In *Hurtado*, of course, an alternative method of finding probable cause was provided by state statute.

In *Lem Woon v. Oregon*, 229 U.S. 586, there was an accusation made against the defendant on sworn complaint and an opportunity for examination by him, which he waived. Then, after arraignment, an information under oath was made by the prosecutor. This is quite different from the prosecutor's naked statement that, "Since the indictment has been returned, we (unidentified other than the prosecutor) have ascertained the name of the defendant."

In *Ocampo v. United States*, 234 U.S. 91, an information was filed under oath by the prosecutor with a sworn declaration of investigation and examination of witnesses under oath. The Court then issued warrants, the parties were brought before the Court, the information was read, and the parties were given copies and two days to file an answer to the charges.

None of the procedures dispenses with the necessary probable cause hearing, and all of them seem to provide an opportunity to the accused to be heard therein, which is more than is provided by the indictment process normally.

In none of them is there any suggestion that the accused was treated differently as an individual or as a member of

a class from the generality of others charged with like crimes, either as individuals or belonging in different classifications.

II. THE AMENDING PROCEDURE CONSTITUTED A VIOLATION OF THE RESPONDENT'S FUNDAMENTAL CONSTITUTIONAL RIGHTS.

We now come to the proposition that the Fictitious Name Statute, M.G.L. ch. 277, § 19, has been construed by the Supreme Judicial Court as authorizing the procedure followed in Gedzium and the amending procedure followed as to Connor, and that being a state law, its construction and validity cannot be challenged in a federal proceeding.

But this construction deprived Connor of his fundamental right under the Massachusetts Constitution to be named in an indictment only after a hearing on probable cause by a Grand Jury. *Jones v. Robbins*, 8 Gray 29. This constituted a denial of due process. Moreover, since indictment is the only process provided for the finding of probable cause in Massachusetts prior to trial, its denial in Connor's case alone was undoubtedly a violation of Connor's federal rights not only as to due process, but also equal protection, under the Fourteenth Amendment, as stated by the Chief Judge of the Circuit Court (A. 6, 7). And whether the statute has been correctly construed or not, the use of the amending procedure resulted in this denial of Connor's constitutional rights.

In *Fay v. Noia*, 372 U.S. 391, at 428, it was said, "It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the copresence of federal grounds." The Court continued, p. 429, "The fatal weakness of this contention is its failure to recognize that the adequate state-ground rule is a function of the limitations of *APPELLATE* review." And on page 430, "But while our appellate function is concerned only with the judgments or decrees of state courts, the habeas corpus

jurisdiction of the lower courts is not so confined. The jurisdictional prerequisite is not the judgment of a state court but detention simpliciter." And on page 432: "While [the Court] has deferred to state substantive grounds so long as they are not patently evasive of or discriminatory against federal rights, it has sometimes refused to defer to state procedural grounds only because they made burdensome the vindication of federal rights."

In Connor's case, his federal rights were denied; the unconstitutional state procedure, whether based on judicial decision or degislative enactment, cannot defeat the intervention of the habeas proceeding.

Nevertheless, the argument of the petitioner Picard is mainly based upon the assumption that the statute relating to fictitious names, G.L. ch. 277, § 19, gives rise to the procedure established in *Commonwealth v. Gedzium* and followed in this case by the Supreme Judicial Court. ("Clearly, of course, the Commonwealth needed the legislative mandate [to amend.]" Picard Brief p. 28). Of course, the statute merely provides that when an accused person has been identified "by a fictitious name or by any other practicable description, with an allegation that his real name (as compared to his fictitious name) is unknown," then something further should be done if his true name is discovered: his true name must be entered on the record and may be used thereafter in the proceedings. There is no provision for a change in the indictment, by motion or amendment or insertion or substitution or any other way whatever; in fact, there must be a further "reference to the fact that he was indicted by the name or description mentioned in the indictment." There is no provision for hearing on probable cause before a judge, a magistrate, or a prosecutor; there is no provision for a finding on probable cause by anyone; and there is no provision for a determination by a neutral judge in place of the Grand Jury "to find probable cause to believe that a certain person's name should be entered on the court records" (Picard Brief,

p. 26). In this statute no change was made in the law requiring, in accordance with the State Constitution, that trial shall be on an indictment (G.L. ch. 263, § 4). "The Manner of Amending the Indictment" (the Picard phrase employed in this case), alleged to be constitutional in Picard's Brief, p. 27, and to have been made possible in the *Gedzium* case (259 Mass. 453) by the statute (Picard Brief p. 28), was neither, as *Gedzium* plainly states, to wit: "It is to be observed that the statute here attacked does not authorize the amendment of the indictment. It is certain that in the absence of an enabling statute an indictment cannot be amended. *Comm. v. Mahar,* 16 Pick. 120; *Ex parte Bain,* 121 U.S. 1. Compare *Comm. v. Holley,* 3 Gray 458. The indictment in the case at bar was not amended. It remains precisely as returned by the grand jury. The record subsequent to the return of the indictment is amplified and made specific as to the real name of the defendant." The entire situation and its consequences to Connor are clearly stated by the Circuit Court (A. 7, 8).

The indictment procedure was therefore not established by the statute but by the *Gedzium* case upon two supports: the first was that "John Doe" is a fictitious name under the statute, the second that the allowance of the "Motion to enter upon the record the true name of the person indicted . . . presupposes the finding by the court of all the facts essential thereto . . . ." No reference is made anywhere in this decision to a "Motion to Amend the Indictment." "John Doe" was regarded as Gedzium's name in a valid indictment. As the Court said, "Some one must be described in an indictment as charged with the commission of crime." *Gedzium,* 156 N.E. 890, 892. The procedure was created as a legitimate device to bring persons to the bar without the cumbersome necessity of satisfying the Grand Jury of the identity of the accused in a hearing on probable cause. This was especially to be avoided when the same Grand Jury had previously heard the two identifying witnesses testify, one of them twice, without getting a shred of identification, by name, nickname, fictitious name, or description.

In Connor's case, however, the Supreme Judicial Court declared, "On August 9 the Commonwealth filed a motion to amend the indictment by substituting the name of James J. Connor for John Doe." 353 Mass. 197; 299 N.E.2d 267. There was no question of an entry on the record here; it was a definite alteration of the indictment, forbidden in matters of substance by the entire body of the law, ancient and modern, including *Gedzium*.

The Court then proceeded, "A hearing was held at which no evidence was introduced. The motion was allowed."

"Thus," says Picard's Brief, p. 25, "the John Doe procedure does not omit the indispensable condition that the inferences from the facts which lead to the complaint be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Mancusi v. DeForte*, 392 U.S. 364, 371 (1968).

"The indispensable condition" was then disposed of by means of the *Gedzium* "presupposition" or presumption. Said the Court, "The judge could act on the district attorney's representations. By the presentation of the motion, these were that the man described in the testimony before the grand jury and designated as John Doe was Connor."

Of course, the judge did act, solely, on the district attorney's representations. These were, in their entirety, "At the time the indictment was returned, the District Attorney and the grand jury did not know the name of the defendant. Since the indictment has been returned, we have ascertained the name of the defendant" (Hearing of August 1965, p. 1). Connor's counsel objected, but the motion was allowed.

(Incidentally, the above remarks dispose of the unwarranted conclusion, stated in a footnote on page 14 of the Picard Brief that "it is equally possible that the officers had ample probable cause to arrest Connor." Connor was arrested "in obedience to the within warrant," a John Doe warrant identical in the material part to the John Doe

indictment, August 6, three days before the amendment was offered. No probable cause for the arrest was ever shown, nor has it ever been suggested that anything but the warrant was relied on. A. pp. 74 and 75.)

The comment of the Supreme Judicial Court on this situation was, "While evidence was not required, a statement by the district attorney to make express the implications of the motion, or the presentation of testimony or of affidavits, would have been appropriate and desirable." *Comm. v. Doherty*, 229 N.E.2d 267 at 273.

"This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights." *Townsend v. Sain*, 372 U.S. 293, 316.

The record is plain. There was no finding of probable cause by the Grand Jury against James J. Connor. A. 71, R. 2: Indictment, August 4, 1965. A. 75, Return of the Warrant on Indictment, August 6, 1965.

But in the Commonwealth the proposition that indictment is a prerequisite to trial by virtue of Article XII of the Declaration of Rights has been accepted as well settled. "The great principle asserted by the Declaration of Rights is that no man shall be put to answer a criminal charge until the incriminating evidence has been laid before a grand jury, and they have found probable cause, at least, to believe the facts true on which the criminality depends." *Comm. v. Holley*, 1855, 3 Gray 458, 459, quoted in *Connor v. Picard*, 434 F.2d 673; *Jones v. Robbins*, 74 Mass. 329, 342-349, 1857.

It is also settled that due process requires that probable cause be found by indictment or otherwise.

"The Grand Jury is a body known to the common law, to which is committed the duty of inquiring whether there be probable cause to believe the defendant guilty of the offense charged. Blackstone says (vol. 4, p. 303): 'This grand jury are previously instructed in the articles of their

inquiry, by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution; for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire, upon their oaths, whether there be sufficient cause to call upon the party to answer it.' A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities; a doctrine that might be applied to very oppressive purposes."

"The thought is that no one shall be subjected to the burden and expense of a trial until there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty." *Beavers v. Henkel,* 194 U.S. 73, 84 (1904).

An indictment is the only method by which probable cause may be found in Massachusetts in serious crimes. The failure to indict Connor and the substitution of the amending procedure by the trial court, with no attempt at finding probable cause, deprived Connor of his fundamental rights under the Constitution of Massachusetts in violation of the Fourteenth and Fifth Amendments of the Constitutionof the United States.

As to the collateral issue of the legality of the arrest, the warrant "did not contain the name of the defendant, nor any description or designation by which he could be known and identified as the person against whom it was issued. It was in effect a general warrant . . . ." *Comm. v. Crotty,* 10 Allen 403, 404 (1865).

It follows that Connor was required to be indicted in order to be tried, but that he was not so indicted.

III. THE RESPONDENT FULLY COMPLIED WITH THE DOCTRINE OF EXHAUSTION OF REMEDIES

The factual situation as to the indictment and arrest was fully presented in the Supreme Judicial Court on Appeal (Connor Brief S.J.C. pp. 1, 2, 7-9). It was also fully presented to the United States District Court (Connor's Mem. pp. 2-5; Petition for Habeas Corpus, pp. 2-4).

The constitutional and legal issues arising out of the indictment and arrest were also fully argued in Connor's Brief in the Supreme Judicial Court (pp. 10-14) as to probable cause, the absolute limitation on material amendments to indictments in serious cases, the nullity of the indictment as an indictment in blank and the warrant as a general warrant, all involving the violation of Connor's rights under Articles XII and XIV of the Massachusetts Declaration of Rights, the statutes concerning indictments, M.G.L. ch. 266, § 4, ch. 277, § 19, the Fifth and Fourteenth Amendments to the Constitution of the United States. These issues were of course also stated and argued in the United States District Court at length (Connor's Mem., pp. 16-21, 24, 25; Petition for Habeas Corpus, pp. 6, 7).

The illegality of the amending procedure as to indictments under the statutes (G.L. ch. 277, § 19, § 35A), the Massachusetts Constitution, Articles XII and XIV, the Federal Constitution, Amendments V and XIV, and the common law, *Commonwealth v. Mahar*, 16 Pick. 120, was raised and argued in the Supreme Judicial Court (S.J.C. Connor Brief, pp. 10, 11, 12, 13).

In regard to the contention of Picard that the Court of Appeals erred in not applying the doctrine of exhaustion, several erroneous assertions have been made, including two in the first sentence, one direct and another indirectly put (Picard Brief, 16). The assumption is clearly conveyed that Connor based his claim of constitutional violation on the fact that M.G.L. ch. 277, § 19, was unconstitutional. This disregards Connor's argument to the court of final appeal stating that, "It is questionable whether the statute was

ever intended to alter the common law rule in capital cases," and that, "'. . . the provisions of . . . § 19, authorizing indictment by 'fictitious name' or 'other practicable description' were misconstrued as permitting a 'John Doe' indictment, with no description of the accused, in *Commonwealth v. Gedzium*, 259 Mass. 453" (Connor Brief, S.J.C. p. 11 and p. 12, respectively). As regards the statement that the Equal Protection Clause was not invoked before the Supreme Judicial Court, the Fourteenth Amendment was by name specifically relied upon (Connor Brief, S.J.C. p. 13).

Consequently, the doctrine of exhaustion of remedies does not apply. As it was stated in *Connor v. Picard*, 1 Cir., 1970, 434 F.2d 673, "Petitioner presented the court with an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim. *United States ex rel. Kemp v. Pate*, 7 Cir., 1966, 359 F.2d 749, 751. That is enough to satisfy the requirements of the doctrine of exhaustion. *Sullivan v. Scafati*, 1 Cir., 1970, 428 F.2d 1023, 1024 n. 1."

Picard overlooks the fact that the language of 28 U.S.C., Sec. 2254(b) and (c), referring to exhaustion of available remedies makes clear that the remedies must be presently available and open at the time of the entry of the petition for Habeas Corpus. *Fay v. Noia*, 372 U.S. 391, 434.

The Court of Appeals did not err but spoke precisely to the point that Connor had gone to the highest state court with his "constitutional claim."

IV. THE AMENDING PROCEDURE SERVED NO VALID STATE PURPOSE

The purpose relied on by the petitioner Picard in his Brief, page 33, seems to be the "simplification of criminal pleadings." However, the reason stated in *Gedzium* is also quoted on the same page.

The first one is a euphemism for the "prosecutorial convenience" mentioned by the Circuit Court of Appeals

(A. 10). The second is, as the Circuit Court also said, rhetoric substituted for evidence.

The sacrifice of the constitutional right to a hearing on probable cause, which might have saved Connor from a trial on perjured testimony, is too high a price to pay for such meagre returns.

"Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Morey v. Dowd*, 354 U.S. 457, 464.

V. THE FEDERAL COURTS HAVE JURISDICTION TO ADJUDICATE THIS CASE

Fay v. Noia, supra, clearly establishes and describes the compelling reasons that bring this case properly to the Federal Courts for decision on Habeas.

Knewel v. Egan, 268 U.S. 442, cited in Picard's Brief, on pages 10 and 14, was decided at a time when there was a right of review by writ of error; and habeas was adjudged not suited to the contemplation of the tenuous constitutional issues involved. *Fay v. Noia, supra,* at page 412.

As to *United States v. Fawcett*, 115 F.2d 64, cited in Picard's Brief on pages 11, 27, and 28, changes in form and insertions not prejudicial to the constitutional rights of the accused are permitted in lesser than capital cases in the Commonwealth by enabling statute, M.G.L. ch. 277, § 35A. These included misnomers, as in the *Fawcett* case.

"This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights . . . . Where the fundamental liberties of the person are claimed to be infringed, we carefully scrutinize the state court record." *Townsend v. Sain*, 372 U.S. 293 at 316.

". . . [W]e have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in

the state court proceedings." *Fay v. Noia, supra,* at 426, 427.

VI. THE RESPONDENT, JAMES J. CONNOR, WAS NOT PROVIDED WITH A FULL AND FAIR TRIAL UNDER THE LAW OF THE LAND IN ACCORDANCE WITH DUE PROCESS

At the hearing on August 13th, 1965, the matter of the grant jury minutes was first discussed, and it was clearly established that Connor had a particularized need for the minutes not only for the purposes of preparation for trial and for cross examination but also to prove conclusively he was not identified nor considered nor indicted by the Grand Jury. The minutes were indispensable to the presentation of testimony by Connor at a preliminary evidentiary hearing on dismissal.

This need was developed in an argument on bail which revolved about the facts of the case to that point insofar as they led to certain inescapable conclusions about the grand jury testimony.

The prosecutor referred to the facts of the case which required that Connor be held without bail. Connor's counsel pointed out that no facts had been revealed in this case. He declared that the facts as to identification or lack of identification of the person charged before the Grand Jury had not been disclosed and that there was no description in the possession of the officer making the arrest. He asserted that the same witnesses had appeared before the Grand Jury between May 1st and August 4th, the latter date being that of the blank indictment, and that Connor was not connected with the crime until after his arrest on August 6th. He related in detail the circumstances of the arrest, which he implied was illegal, being without probable cause. He stated among other things that Connor did not attempt to flee from the place of arrest, although he had an opportunity. This was the only fact that the prosecutor denied and he then gave that fact as the ground of his

recommendation of no bail. (The denial was not positive, "I wasn't there, but I understand he attempted to flee. Based on these facts [sic], the Commonwealth highly recommends there be no bail.") Connor's counsel then again requested some information from the prosecution justifying anything, bail, arrest, or indictment. The Court then stated justification as follows, "I think the obvious fact is that the grand jury has indicted him for first degree murder." This variant of the colloquial saying, "He must be guilty, or they wouldn't have arrested him," was immediately denied by Connor's counsel, to whom the Court replied in effect that the question of indictment was a matter for trial. The Court, however, then inquired of the prosecutor for the Grand Jury minutes. The prosecutor replied that they were being typed up, that they hadn't been typed. These minutes related to hearings which had taken place in part at least two months before and had concluded nine days before. The Court then asked the prosecutor as an officer of the Court if he would state that Connor's counsel was in error. Whereupon the prosecutor admitted that counsel for Connor was right in certain things but did not specify which. As he had previously denied specifically only the statement that Connor did not flee arrest and that very uncertainly, it is obvious that he was aware that the statements of Connor's attorney as to the evidence before the Grand Jury were correct.

The Court then promised to look at the Grand Jury minutes, if that motion was presented.

At the hearing of August 24th the motion for the minutes was presented. The prosecutor commenced with unsupported statements regarding a campaign of "unabashed terror" by the defendants, all of whom were in custody, against the witnesses. The Court asked for some basis. No basis was given except further wild assertions about additional murders and complete terror. The colloquy between the Court and Connor's counsel indicated that the Court had not inspected the Grand Jury's minutes as yet. The

motion was denied without prejudice. The Court suggested particulars and specifications and that it could not disregard the statements of the prosecutor made in open court. In this discussion the invalidity of the arrest was brought out, and the circumstances surrounding the arrest and the indictment were again shown to prove the particularized need for the minutes of the Grand Jury. The Court persisted in treating the discussion as an attempt to establish guilt or innocence, while Connor's counsel repetitiously asserted the irresistible tendency of the known facts to show lack of probable cause for the indictment and the need for the minutes to establish this conclusion beyond the shadow of a doubt.

On September 15th Connor's counsel argued on a motion for particulars (pages 10 to 16) the particularized need of Connor for certain Grand Jury information to be obtained through the particulars in order to guarantee the defendant his constitutional rights. On all such particulars the motion was denied.

On January 17th Connor's counsel repeatedly requested, in a hearing on a motion to inspect and copy documents, a statement declared by the prosecutor to have been made by a witness as to certain utterances alleged to have been made by Connor at the time of the homicide. Connor's counsel demanded that such a copy of the alleged statement should be given to the defense, implying that the statement had never been uttered before the Grand Jury (pp. 3, 4, 5).

At the hearing of February 9th the necessity of the defense for the minutes was argued again by Connor's counsel (pp. 20-23). A federal case was cited: *Allis-Chalmers v. The City*, 323 F.2d 233.

At the hearing of March 10th, the motion for inspection of the minutes was renewed, and an exception was taken to its denial (p. 18).

At the trial on page 903 the Court, in saying that the defense could not question the witness Betty Moore as to

inconsistent statements made before the Grand Jury unless it first introduced positive evidence of such inconsistent statements, blandly ignored the fact that the Court's action in denying the defense access to the minutes precluded the proof which it demanded, and then called the attempt so to question the witness a "fishing expedition for the purpose of getting the grand jury minutes in evidence here and only for that purpose." By this time it seemed that the primary objective of the Court and prosecution had become the prevention of the public revelation of the testimony contained in the minutes. When counsel for a co-defendant suggested that the Court look at the minutes and then decide whether the questions could be put, the Court immediately foreclosed this by allowing such questioning at once (Tr. 905). After admissions of inconsistent statements, the defense moved for the minutes (Tr. 908). The Court suggested getting the stenographer and refused to give the minutes to counsel. The Court then suggested that the prosecutor give the defense the name of the stenographer (Tr. 909). The prosecutor evaded this, implying that he didn't know the name, but he promised to find out. Of course, this was never done. The Court then instructed the prosecutor to produce the stenographer (after he should find out who the stenographer was) and also the minutes "only in relation to the matter at issue as to this witness." The prosecutor said he would try. He had but "one set" of minutes. Of course, neither any part of the minutes nor the stenographer were ever produced.

The prosecutor later, on another demand, said he would not produce the minutes, but he offered to put the stenographer on the stand to recite the testimony of the witness Moore (Tr. 914).

During the direct examination by the prosecutor of the witness Betty Moore it became material to determine the date when she went before the first Grand Jurly in 1965. The prosecutor refused to admit that he knew the date, and declined to place it more accurately than "either June or July" (Tr. 873).

On September 8, 1965, your respondent filed a motion for the names of the witnesses who had testified before the Grand Jury, as these names had not been endorsed upon the indictment. The Court purported to grant this motion on September 14th but ordered the list "impounded" in the Clerk's office. This was done on October 21st. On November 23rd Connor filed a motion for the addresses of the witnesses, and for an opportunity to interview witnesses in custody. This was denied on February 9th. On January 17th the counsel for Connor complained to the Court that he had been given no list of witnesses. The Court said, "They can't keep the witnesses from you."

Up to the time of trial counsel for Connor never was granted an opportunity to interview any witness in custody or sufficient information to enable him to interview any of the several disinterested witnesses.

This course of conduct on the part of the prosecution and the Court constituted an interference with his fundamental constitutional right to a fair trial under both state and federal law.

The right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him secured by the Sixth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965). *Bruton v. United States*, 20 L. Ed. 2d 476 (1968).

Attorneys for two co-defendants filed motions for particulars and in response on December 13th, 1965, the prosecution filed certain improper and incompetent specifications (R. 9ff, Papers No. 5 and No. 6, Case No. 18314, and R. 29ff, Papers No. 4 and 5, Case No. 19465). In these particulars certain statements purporting to be factual were made as to all four defendants. They were so far from coinciding with the evidence at the trial that, in the case of William Doherty, although their purpose was to establish his guilt as an accessory before the fact, the Supreme Judicial Court was constrained to reverse the conviction of Doherty and direct the entry of judgment for him on that charge.

Aside from the fact that the prosecutor ignored and defiantly failed in these papers, or at any time prior to trial, to furnish certain details requested, e.g., "the means by which the crime was committed," made statements of fact that he never attempted to prove, and was still concealing on December 13th the names of two material Grand Jury witnesses, Betty Moore and Ronald Hayes, referred to as "a third person" and as "other persons who were present," these particulars, which were part of the record and went to the jury with the indictment to be considered and read by them in their deliberations, contained also a most inflammatory description of the homicide, which could not fail to be prejudicial to Connor, since he was positively named as one of the killers in both sets of answers. These particulars were read to the jury by the Assistant Clerk of Court, attending the trial, as parts of the indictments, on the second day, and the reading occupies twenty-three pages of the record, as follows: as to Connor and the co-defendant Landry, three and a half pages (Tr. 56-59), as to the co-defendant Janice Doherty, charged as an accessory, in whose case the particulars were most incendiary and prejudicial, eleven and a half pages (Tr. 60-72), and as to the co-defendant William Doherty, seven and a half pages (Tr. 72-79).

In view of the Court's statement to the jury, at the opening of the session on the third day (Tr. 88-89), that the effect of the particulars when filed is "to bind and restrict the Commonwealth as to the scope of the indictment and the proof offered under it," the failure to take some action, and especially in regard to the particulars as to William Doherty, is incomprehensible except as part of the pattern revealed from the beginning by the refusal to send the case back to the Grand Jury to consider the indictment of the accused James Connor, by the many refusals of the prosecutor to reveal the names of the Grand Jury witnesses, in violation of the established law of the land, by the failure of the prosecutor to produce or the Court to order the production of proof of valid arrest when

such was denied by Connor at many of the preliminary hearings on repeated statements of facts never contradicted by the prosecutor, by the persistent and successful struggle waged by the Court and prosecutor to deny the defendants the opportunity to interview certain material witnesses under appropriate conditions, the exclusion of certain testimony tending to impeach the witness Betty Moore and to demonstrate her involvement in at least two criminal conspiracies connected with the homicide although the evidence was later acknowledged by the Supreme Judicial Court to have been admissible, and by the devious maneuvers and fabrications employed and tolerated to ensure the shrouding of the Grand Jury minutes from the clear eye of inquiry according to due process.

The statements in the particulars were not presented as evidence, but they reached the jury nevertheless in a positive and uncontradicted form. Neither cross-examination nor any other form of testimony was available to contradict them. There were limiting instructions which were not particularly forceful or in any way detailed (Tr. 88-89), which doubtless had even much less than the usual effect. "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction . . . ." (quoted in *Bruton* from *Krulewitch v. United States*, 336 U.S. 440, 453).

The respondent Connor was just as helpless in the face of these declarations as he would have been had a co-defendant's confession involving him been read, as in *Bruton*. And he was harmed thereby in exactly the same manner.

And the remedy, as in *Bruton*, was the granting of the motion for severance, a motion which was denied.

The question whether a right or principle becomes incorporated in the Due Process Clause of the Fourteenth Amendment depends upon whether or not it is so fundamental and essential to a fair trial that its denial prevents the accomplishment of such a trial. *Washington v. Texas*,

388 U.S. 14. *Gideon v. Wainwright*, 372 U.S. 335. *Duncan v. Louisiana*, 391 U.S. 145.

It is the contention of Connor that the foregoing series of actions and rulings on the part of the prosecutor and the trial Court constituted an almost complete deprivation of those fundamental rights which guarantee a full and fair trial and which are the substance of the great phrases not only of the Fourteenth Amendment but also of Articles XI, XII, and XIV of the Massachusetts Constitution, the innumerable violations of which latter are in themselves a breach of federal Due Process and Equal Protection.

CONCLUSION

The respondent requests that the judgment of the Circuit Court be affirmed.

Respectfully submitted,

James J. Connor

By his attorney,

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ADDENDA

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

ADDENDUM I

Constitution of the United States

Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ADDENDUM II

Constitution of Massachusetts

Part the First, Article XI (Declaration of Rights): Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Part the First, Article XII (Declaration of Rights): No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Part the First, Article XIV (Declaration of Rights): Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons,

or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

ADDENDUM III

United States Code

2254. State Custody; Remedies in Federal Courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State

or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State Court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraph numbered (1) to (7), inclusive, is shown by the applicant, other-

wise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

ADDENDUM IV

General Laws of Massachusetts

Ch. 263, § 4: No person shall be held to answer in any court for an alleged crime, except upon an indictment by a grand jury or upon a complaint before a district court or in proceedings before a court-martial.

Ch. 277, § 19: If the name of an accused person is unknown to the grand jury, he may be described by a ficti-

tious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent state of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment.

Ch. 277, § 35A: Upon motion of the district attorney or prosecuting officer, the court may order the complaint or indictment amended in relation to allegations or particulars as to which the defendant would not be prejudiced in his defense.

PICARD *v.* CONNOR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 70–96. Argued November 17, 1971—Decided December 20, 1971

A grand jury returned a murder indictment against a named individual "and John Doe, the true name and a more particular description of the said John Doe being to the said Jurors unknown." After respondent's arrest the indictment was amended pursuant to state law to substitute respondent's name for "John Doe." The highest state court affirmed respondent's subsequent conviction, rejecting his challenge to the legality of the indictment made on the ground that the amending procedure did not comply with the statute. Respondent subsequently filed a petition for a writ of habeas corpus in the District Court, which dismissed the petition. The Court of Appeals reversed, holding that the procedure by which respondent was brought to trial was violative of equal protection. The court rejected petitioner's contention that respondent, who had not previously raised the equal protection issue, had not exhausted available state judicial remedies as required by 28 U. S. C. § 2254, holding that respondent had presented the state court with "an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim." *Held:* The substance of a federal habeas corpus claim must in the first instance be fairly presented to the state courts, and since on the record and argument before it the State's highest court had no fair opportunity to consider and act upon the equal protection claim, the Court of Appeals erred in holding that respondent had exhausted his state remedies. Pp. 275–278.

434 F. 2d 673, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 278.

John J. Irwin, Jr., Assistant Attorney General of Massachusetts, argued the cause for petitioner. With him on the brief were *Robert H. Quinn*, Attorney General,

Ruth I. Abrams and *Charles E. Chase*, Assistant Attorneys General, and *Garrett H. Byrne*.

James J. Twohig, by appointment of the Court, 402 U. S. 993, argued the cause and filed a brief for respondent.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Court of Appeals for the First Circuit, reversing the District Court's dismissal of respondent's petition for a writ of federal habeas corpus,[1] held that "the procedure by which [respondent] was brought to trial deprived him of the Fourteenth Amendment's guarantee of equal protection of the laws." 434 F. 2d 673, 674 (1970). The Court of Appeals acknowledged that respondent had not attacked his conviction on the equal protection ground, either in the state courts or in his federal habeas petition:

> "[Respondent] did not present the constitutional question to the Massachusetts court in the particular focus in which this opinion is directed. We suggested it when the case reached us, and invited the Commonwealth to file a supplemental brief. Not unnaturally its first contention was to assert that [respondent] had not exhausted his state remedy . . . ." *Ibid.*

The Court of Appeals rejected that contention and held that respondent had exhausted available state judicial remedies, as required by 28 U. S. C. § 2254,[2] because he

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[1] 308 F. Supp. 843 (Mass. 1970).

[2] 28 U. S. C. § 2254 provides in pertinent part:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is

had "presented the [state] court with 'an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim.'" *Ibid.* We granted certiorari to consider that ruling in light of the command of § 2254. 402 U. S. 942 (1971). We hold that the State's objection should have been sustained, and we therefore reverse for further proceedings, see *Slayton* v. *Smith, ante,* p. 53, without reaching the merits of the constitutional question decided by the Court of Appeals.[3]

A Massachusetts grand jury returned an indictment for murder against Donald Landry "and John Doe, the true name and a more particular description of the said John Doe being to the said Jurors unknown." After respondent's arrest, the indictment was amended in a proceeding pursuant to a fictitious-name statute, Mass. Gen. Laws Ann., c. 277, § 19,[4] to substitute respond-

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either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

[3] Respondent does not contend that there are no available state judicial remedies through which he can present the equal protection claim. It appears that Massachusetts provides postconviction procedures adequate to adjudicate that claim, either by motion for a new trial, Mass. Gen. Laws Ann., c. 278, § 29; see *Earl* v. *Commonwealth,* 356 Mass. 181, 248 N. E. 2d 498 (1969), or by writ of error, Mass. Gen. Laws Ann., c. 250; see *Cortellesso* v. *Commonwealth,* 354 Mass. 514, 238 N. E. 2d 516 (1968); *Crowell* v. *Commonwealth,* 352 Mass. 288, 225 N. E. 2d 330 (1967); *Shoppers' World, Inc.* v. *Board of Assessors,* 348 Mass. 366, 376 n. 9, 203 N. E. 2d 811, 819 n. 9 (1965).

[4] "If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall

ent's name for "John Doe." The Massachusetts Supreme Judicial Court affirmed respondent's subsequent conviction, *sub nom. Commonwealth* v. *Doherty,* 353 Mass. 197, 229 N. E. 2d 267 (1967). Among other grounds of appeal, respondent challenged the legality of the indictment. The gist of respondent's argument, which he also asserted during various trial proceedings, was that the amending procedure did not comply with the statute as construed by the Massachusetts courts, with the result that he had not been lawfully indicted for the crime. See *Commonwealth* v. *Gedzium,* 259 Mass. 453, 156 N. E. 890 (1927).[5] The only suggestions of a claimed denial of a federal right were statements in respondent's brief questioning the continuing validity of the holding in *Gedzium* that the provision of the Fifth Amendment that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" was inapplicable to the States. 259 Mass., at 457, 156 N. E., at 891; see *Hurtado* v. *California,* 110 U. S. 516 (1884).[6] We have examined the

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not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment."

[5] Although the Massachusetts Constitution does not expressly provide for grand jury indictments, the Massachusetts courts have construed Art. XII of the Declaration of Rights to require that "'no person . . . shall be held to answer for a capital or otherwise infamous crime . . . unless he shall have been previously charged on the presentment or indictment of a grand jury.'" *Jones* v. *Robbins,* 74 Mass. 329, 344–345 (1857).

[6] In arguing his first assignment of error:

"[T]he dismissal in the *Gedzium* case of the applicability of the Fifth Amendment provision . . . would appear to be in need of reexamination, in the light of the development by the United States